STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HAMTRAMCK BOARD OF EDUCATION,
Public Employer - Respondent,

Case No. C09 L-237

- and -

HAMTRAMCK FEDERATION OF TEACHERS, AFT, AFL-CIO,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Dickinson Wright, PLLC, by George P. Butler, III, for the Respondent

Mark H. Cousens, for the Charging Party

DECISION AND ORDER

On March 25, 2011, Administrative Law Judge Julia C. Stern issued a Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts as its order the order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

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Public Employer-Respondent,

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HAMTRAMCK FEDERATION OF TEACHERS, AFT, AFL-CIO,
Labor Organization-Charging Party.
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APPEARANCES:

Dickinson Wright, P.L.L.C, by George P. Butler, for Respondent

Mark H. Cousens, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on August 9, 2010, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before September 24, 2010, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Hamtramck Federation of Teachers, AFT, AFL-CIO, filed this charge against the Hamtramck Board of Education on December 3, 2009. Charging Party represents a bargaining unit consisting of professional employees, including teachers, employed by Respondent. The charge alleges that Respondent violated Section 10(1) (a) of PERA on November 19, 2009 when the president of Respondent's school board, Titus Walters, threatened Bohdan Karpinsky's job because of Karpinsky's actions as Charging Party's president.

Findings of Fact:

The November 19 Incident

Bohdan Karpinsky is employed by Respondent as a middle school teacher. He has been Charging Party's president since 1994. As president, Karpinsky has an active role in both grievance adjustment and collective bargaining. Titus Walters has been a member of Respondent's school board since the early 2000s and has been its president since 2006. Karpinsky and Walters have had numerous conversations about school district issues during their years of service in their respective roles of union president and school board member. Some of these conversations included the use of profanity.

Sometime prior to November 19, 2009, Karpinsky was present at a meeting of Respondent school board at which there was discussion among the board members regarding whether Respondent's athletic director should also be permitted to hold a coaching position. Walters argued in the affirmative, pointing out that past athletic directors had been coaches. After that board meeting, Karpinsky filed a grievance alleging that permitting the athletic director to hold a coaching position violated the collective bargaining agreement.

After school on November 19, 2009, Respondent's superintendent, Thomas Niczay, came to Karpinsky's middle school to hold a second step grievance meeting on the athletic director grievance. The two men reached an agreement on a resolution of the grievance, which was to allow the athletic director to continue to serve as coach for the remainder of that season only. At about 4:00 pm, both men went to the school's auditorium to attend a presentation for parents. Walters was also in attendance at the presentation. Niczay did not mention to Walters during the presentation that he had settled the athletic director grievance.

About a half hour after Karpinsky and Niczay entered the auditorium, Walters motioned first to Niczay and then to Walters to follow him, and the three men left the auditorium and went into a nearby teacher's lounge. No one else was in the room at that time. Karpinsky and Niczay sat down at a table. Walters remained standing and, facing Karpinsky, began to shout at him. Karpinsky initially testified as follows regarding Walters' remarks:

> It was something to the effect of you're what's wrong with Hamtramck, you motherfucker, you're all done. You better retire in three to four months or I'll have your job, you're all done. I'll have a couple students make up a couple things, say this and that, and you'll be gone, motherfucker. And at that point, I said, would you please just sit down, we can discuss this in a civilized manner. And he says, fuck you. He says, I'm going to break your back, you're all finished.

Later, Karpinsky recalled that Walters had also accused him of carrying out personal vendettas, and, after threatening to break Karpinsky's back, Walters said, "We'll see who has the biggest cojones." Walters did not explain why he was so angry. Karpinsky assumed that it was because of the athletic director grievance only because he could think of no other reason why Walters would be so upset.

Niczay generally confirmed Karpinsky's testimony, including Walters' threat to "have his job." Niczay described Walters as screaming at Karpinsky. Niczay testified that he had heard Walters use profanity in reference to Karpinsky before, but that he had never before heard him threaten Karpinsky's employment. Niczay also testified that he did not know why Walters was angry on that day. Walters was not called as a witness.

After making the above statements, Walters abruptly left the room. Karpinsky told Niczay that he should be prepared to tell the truth about what happened. Niczay said, "Oh boy, what a day." Both then got up, left the room, and returned to the auditorium.

Walters did not apologize to Karpinsky for his statements on November 19 and, insofar as the record discloses, the two men did not discuss the incident after it occurred. As of the date of the hearing, neither Walters nor Respondent's school board had taken any adverse action against Karpinsky, but neither had they explicitly repudiated the threat.

Applicable Provisions of the Collective Bargaining Agreement and Board Bylaws

Article XV (A) of the parties' collective bargaining agreement affirms Respondent's non-discrimination policy, including its commitment not to discriminate against any teacher on the basis of membership or participation in or association with the activities of any teacher organization.

The bylaws of Respondent's school board state:

> Individual members of the Board do not possess the powers that reside in the Board of Education. The Board speaks through its minutes and not through its individual members. An Act of the Board shall not be valid unless approved at an official meeting by at least a majority vote of the members elected to and serving on the Board. MCL 380.1201

The bylaws also include a provision requiring individual board members, when writing or speaking on school matters to the media, legislators, and other officials, to make it clear that their views do not necessarily reflect the views of the Board or of their colleagues on the Board.

Discussion and Conclusions of Law:

Section 10(1) (a) of PERA makes it unlawful for a public employer or "an officer or agent of a public employer" to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed by Section 9 of the Act. An employer violates Section 10(1) (a) by conduct which can reasonably be said to have had the effect of coercing employees in the exercise of their protected rights. While union animus is a necessary element of a violation of Section 10(1) (c) of PERA, union animus is not required for a violation of Section 10(1) (a) because whether an employer's conduct violates Section 10(1) (a) does not turn on its motive but whether the employer engaged in conduct which, it may reasonably said, tended to interfere with the free exercise of employee rights under the Act. *City of Detroit (Fire Dept),* 1982 MERC Lab Op 1220, 1226; *St Clair Co Intermediate Sch Dist,* 1999 MERC Lab Op 38. An employer violates Section 10(1) (a) by threatening to retaliate against or penalize employees because they have filed grievances or engaged in other types of

activity protected by the Act. *New Haven Cmty Schs,* 1990 MERC Lab Op 167, 179. Whether an employer's statement violates Section 10(1) (a) does not depend on the employer's motive or whether the employee was actually coerced, but whether a reasonable employee would interpret the statement as a threat. *City of Greenville,* 2001 MERC Lab Op 55, 56. In applying the "reasonable employee" standard, the Commission examines both the content of the remarks and the context in which they occurred. *City of St Clair Shores,* 17 MPER 76 (2004).

Of the arguments made by Respondent for dismissal of the charge, two are significant. First, Respondent asserts that Charging Party failed to show that there was any relationship between Walters' threat and Karpinsky's exercise of his Section 9 rights. It points out that although Karpinsky interpreted the threat as connected to his filing of the athletic director grievance, he admitted that this was just a guess, In fact, there was no evidence presented that Walters knew that the grievance had been settled or even that one had been filed.

As noted above, evidence of unlawful motive is not required to find a Section 10(1) (a) violation. Rather, the question here is whether a reasonable employee in Karpinsky's situation would have interpreted Walters' threat to be connected to Karpinsky's union activities. In this case, Walters chose to make his remarks to Karpinsky in Niczay's presence, rather than in private or in the presence of Karpinsky's principal. This suggests Walters' threats were related to his actions as union president rather than to some personal dispute between the two men or to Karpinsky's conduct in the classroom. Moreover, although Walters might have provided an alternate explanation, Respondent did not call him as a witness. The Commission has affirmed that an adverse inference may be drawn regarding any factual question to which a witness is likely to have knowledge when a party fails to call that witness and the witness can reasonably be assumed to be favorably disposed toward that party. *Wayne Co,* 21 MPER 58 (2008). I find that a reasonable union president in Karpinsky's situation would have concluded that he was being threatened because of his actions as union president.

Second, Respondent argues that the charge must be dismissed because Charging Party made no showing that the Respondent's board itself engaged in any wrongdoing. Section 1201 of the Michigan School Code, MCL 380.1201, provides that an act of a school board is not valid unless authorized at a meeting by a majority vote of the members elected or appointed to and serving on the board, and a proper record is made of the vote. As the bylaws of Respondent's board state, a school board speaks through its minutes and not through the statements of its individual members. As this principle is set out in the board's bylaws, Karpinsky should be presumed to know it. In this case, Walters was not authorized by the board as a body to make the statements he made to Karpinsky. Therefore, Respondent argues, Karpinsky could not reasonably have interpreted Walters' threat as coming from the board and the board cannot be held responsible for Walters' statements.

The problem with this argument is that Walters did not represent himself as speaking for the board. What Walters actually threatened to do was to manufacture evidence against Karpinsky that would get him terminated. ("I'll have a couple students make up a couple things, say this and that, and you'll be gone, motherfucker.") However, it was Walters' role as a member of Respondent's Board that put him in the position to carry out his threat. As a board member, Walters could, within the scope of his authority, lodge charges against Karpinsky, persuade his fellow board members to give credence to charges which might otherwise be dismissed as meritless, and participate in the

Board's deliberations and decision on whether to proceed with the charges under the Tenure Act, MCL 38.104. Moreover, as board president, Walters might have had influence that exceeded his formal authority. I conclude that a reasonable employee in Karpinsky's situation would have concluded that Walters had the capacity to carry out his threat.

Questions of agency under PERA are controlled by the common law of agency. *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/MEA,* 458 Mich 540, 557 (1998). Fundamental to the existence of an agency relationship is the principal's right to control the conduct of the agent in the matters entrusted to him. *St Clair ISD* at 557; *Capitol City Lodge No 141, FOP v Meridian Twp,* 90 Mich App 533, 541 (1979). The "matters entrusted" to individual members of a school board clearly include participation in disciplinary decisions. I conclude that Respondent can be held responsible for Walters' statements because he was acting as Respondent's agent when he threatened to use his position as a member of Respondent's board to force Karpinsky to resign or get him discharged.

Respondent cites *Owendale-Gagetown Sch Dist,* 1985 MERC Lab Op 584 as standing for the proposition that statements made by individual board members cannot be attributed to the school district. However, Respondent reads too much into this decision. In *Owendale,* a union filed a charge on behalf of a teacher alleging that the employer had allegedly threatened to terminate her because of activity protected by Section 9. The alleged protected activities consisted of: (1) filing a claim for unemployment benefits which both the administrative law judge and Commission found constituted misconduct because made in bad faith; and (2) making a claim for back wages with the State of Michigan after the employer illegally deducted the amount of her unemployment benefits from her paycheck without her authorization. After the employer was ordered by the State to return these monies, several board members remarked at a public board meeting that they would like to terminate the teacher "because they did not like someone like her working for the school system." The Commission dismissed the allegation that the latter was an unlawful threat in a single sentence, "The statement of individual board members, made after Folk received her favorable decision from the Bureau of Employment Standards, did not *in context* constitute a coercive threat." [Emphasis added]. In other words, the Commission applied the reasonable employee standard to the remarks of the board members and concluded that, in context, they were not coercive. It did not hold that a school district could never be held responsible for threats made by individual board members. Compare, *Detroit Pub Schs,* 22 MPER 89 (2009) (no exceptions), in which the administrative law judge relied on threats made by the president of the employer's school board to establish that the employer was hostile toward the charging parties' protected activity.

Respondent also argues that a reasonable employee in Karpinsky's situation would not have interpreted Walters' statements as a threat, in part because a reasonable employee would have known that Walters could not terminate him without a majority vote of the board. As discussed above, I find that Walters had the ability to do what he threatened to do. Moreover, as both Karpinsky and Niczay testified, the ordinary give-and-take between Walters and Karpinsky did not include threats to Karpinsky's employment. Walters did not apologize to Karpinsky after the incident or rescind his threat. I conclude that a reasonable employee in Karpinsky's situation would have interpreted Walters' statements as a threat.

Finally, Respondent asserts that the charge should be dismissed because it involves only a contract dispute. It does not. A public employer's interference with its employees' exercise of rights

protected by PERA is an unfair labor practice under Section 10(1) (a) of PERA. That Charging Party might also have had grounds for a grievance under the collective bargaining agreement is irrelevant to the question of whether Respondent's conduct in this case constituted unlawful interference with Karpinsky's rights.

In accord with the findings of fact and discussion and conclusions of law above, I find that Respondent violated Section 10(1) (a) of PERA when the president of Respondent's school board, Titus Walters, unlawfully threatened to use his position as a school board member to get Charging Party President Bohdan Karpinsky fired because of Karpinsky's actions as union president. Charging Party requests that the remedy for this violation include requiring Respondent to mail a copy of the notice to employees to every member of its bargaining unit in addition to posting the notice on its premises. I conclude, however, that posting the notice is adequate to inform Charging Party's unit members of the unfair labor practice. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Hamtramck Board of Education, its officers and agents, including individual members of its board and its board president, shall:

1. Cease and desist from restraining or coercing employees in the exercise of rights protected by Section 9 of PERA by threatening their employment because of their union or other activities protected by that law.

2. Ensure that all employees, including Hamtramck Federation of Teachers President Bohdan Karpinsky, are free to engage in lawful concerted activity, through representatives of their own choice, for the purposes of collective bargaining or other mutual aid or protection.

3. Post, for a period of thirty (30) consecutive days, the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees represented by the Hamtramck Federation of Teachers are normally posted and in at least one location at each of its school buildings.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____